BIG JUNKYARD SDN BHD & ANOR v. CHAN KAH WAI

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[CIVIL APPEAL NO: WA-12BNCvC-99-12-2021]
21 NOVEMBER 2022

Abstract – *When there is a failure to obtain the consent of a landlord and fraudulent misrepresentation is proved, a sub-tenancy agreement is considered invalid and void ab initio. However, correct principles must be applied in awarding damages. There is no justification in awarding general, aggravated or exemplary damages where there is no evidence of offensive conduct or arrogance or insolence of motive, or of 'outrageous' conduct.*

CONTRACT: *Agreement – Sub-tenancy agreement – Failure to obtain consent of landlord – Whether there was fraudulent misrepresentation – Whether sub-tenancy agreement invalid and void ab initio*

CONTRACT: *Misrepresentation – Agreement – Sub-tenancy agreement – Whether misrepresentation fraudulently made by second defendant – Whether plaintiff entitled to rescission of sub-tenancy agreement – Finding of second defendant's liability for losses suffered by plaintiff – Whether correct and based on evidence*

DAMAGES: *Liability – Fraudulent inducement – Whether defendants liable to pay plaintiff, jointly and severally, damages directly flowing from fraudulent inducement – Whether correct principles applied in awarding restitutionary damages – Whether Sessions Court Judge erred in making global award consisting of general damages, aggravated damages and exemplary damages*

The plaintiff was a sole proprietorship trading as YTwo Coffee House while the first defendant was in the restaurant and bar business located at the ground floor of a building ('R & B business'). The second defendant was the managing director of the first defendant and majority shareholder. It was claimed that, in a meeting arranged by a realty agent, an offer was made to purchase the R & B business including its furniture, fixtures, fittings and equipment at a sum of RM31,500 and to rent the said premises at RM10,000. It was alleged that the second defendant had represented then that the first defendant was the landlord of the premises. The plaintiff accepted the offer and paid RM10,000 to the said agent as rental deposit pending the tenancy agreement being executed. Subsequently, the plaintiff realised that the first defendant was not the landlord as the tenancy agreement prepared by the agent was actually a sub-tenancy agreement. It was claimed that as a result of the second defendant's representation that the consent of the landlord had been obtained to sub-let the premises, the plaintiff said that he was induced

to execute the sub-tenancy agreement. The plaintiff claimed that he paid a sum of RM61,500 into the account of the first defendant which was the payment for the furniture, fittings and equipment (RM31,500), two months' advance rental (RM20,000) and security and utilities deposits (RM10,000). The plaintiff also claimed to have spent RM55,598.50 to improve and renovate the said premises, purchase furniture and equipment for the R & B business. However, the plaintiff later alleged that he was informed by the representative of the landlord of the said premises, Idea Stream Media Sdn Bhd ('landlord') that the first defendant did not obtain any consent to sublet the said premises. The plaintiff was given a copy of the tenancy agreement between the landlord and the first defendant which was produced by the plaintiff in evidence ('tenancy agreement'). The plaintiff claimed that the landlord had demanded that the plaintiff vacate and hand over possession of the said premises to the landlord immediately or face legal action. The plaintiff complied with the demand of the landlord. Thereafter, the plaintiff commenced an action in the Sessions Court for restitution for the sum of RM127,098,50 that had been expended and general damages, aggravated damages and exemplary damages for fraudulent misrepresentation. The claim against the first defendant was that the sub-tenancy agreement was void for total failure of consideration and that the plaintiff had the right to rescind the same *ab initio*. The plaintiff also sought to lift the corporate veil by making the second defendant jointly and severally liable being the first defendant's directing mind and will and making the fraudulent misrepresentation and causing loss to him. The Sessions Court Judge ('SCJ'), in finding on a balance of probabilities that the plaintiff had proven his case, held that the first defendant had not obtained the consent of the landlord for the sub-tenancy agreement to be made pursuant to the said tenancy agreement. Thus, it was held that the sub-tenancy agreement entered between the plaintiff and the first defendant was invalid and void *ab initio* on the misrepresentation of the second defendant. The SCJ also found that the second defendant had fraudulently misrepresented to the plaintiff that the consent from the landlord was obtained under the tenancy agreement and had thereby induced the plaintiff to enter into the sub-tenancy agreement. The veil of incorporation was also lifted and the second defendant was held severally and/or jointly liable with the first defendant. Dissatisfied, the first and second defendants appealed against the decision of the SCJ. The issues that arose were: (i) whether the sub-tenancy agreement was invalid; (ii) whether the second defendant was liable; and (iii) whether the defendants were liable to pay the plaintiff, jointly and severally, damages.

Held (allowing appeal in part):

(1) The fact that the first defendant did not have the consent to sub-let the premises and had, through the misrepresentation by the second defendant, induced the plaintiff to enter into the sub-tenancy agreement

was a critical fact. The first defendant had no right to sub-let the premises to the plaintiff and, therefore, the SCJ was correct to rely on the principle in *Ishak Ahmad v. Unggul 88 Sdn Bhd & Ors*. There was no error of law committed by the SCJ. (para 20)

(2) The SCJ made a finding of fact that the termination of the sub-tenancy agreement was the result of the landlord threatening legal action against the plaintiff on the ground that the landlord had not given its consent to sub-let the premises. The story of the landlord asking the plaintiff to leave the premises was very probable. The allegation that the landlord had disturbed the peace of the plaintiff was supported by, *inter alia*, (i) the landlord had given a copy of the tenancy agreement to the plaintiff and asked the plaintiff to leave the premises; (ii) the plaintiff was forced to hand over the premises back to the landlord; and (iii) the plaintiff was unable to continue with the business in such circumstances. There was no reason to disturb the finding of fact made by the SCJ. The SCJ was not plainly wrong in making the findings and decision arrived at. (paras 22, 27 & 28)

(3) The second defendant was the directing mind and will or the alter ego of the first defendant. The second defendant had made fraudulent representations to the plaintiff to induce the plaintiff to enter into the sub-tenancy agreement which the plaintiff otherwise would not have done so. The second defendant was the signatory for the first defendant on both the tenancy agreement and the sub-tenancy agreement and was well aware of all the facts especially that consent of the landlord must be obtained before the premises could be sub-let. The SCJ's finding of the second defendant's liability for the losses suffered by the plaintiff were correct and based on evidence. (paras 31)

(4) The defendants were liable to pay the plaintiff, jointly and severally, damages directly flowing from the fraudulent inducement. The SCJ had applied the correct principles in awarding restitutionary damages except for failing to take into account RM20,000 that was received for furniture sold. Appellate interference was warranted to reduce the amount to RM69,371.50. However, the SCJ had acted on a wrong principle of law or had misapprehended the facts when making a global award consisting of three heads of damages, namely, general damages, aggravated damages and exemplary damages. Firstly, the global award made went against the principle of awarding damages in the form of reparations for actual damage directly flowing from the fraudulent misrepresentation. An award of general damages did not arise based on the facts of the case at hand and evidence led in court. The fact was that no evidence of general damages was produced before the trial judge. Secondly, aggravated and exemplary damages were not warranted on the facts of

this case. As such, to award a global sum consisting of these two heads of damages was plainly wrong. There was nothing exceptional about the action of the second defendant. There was no evidence of offensive conduct or arrogance or insolence of motive or that the second defendant was motivated by malevolence or spite. The SCJ had erred in law when awarding aggravated damages, *albeit*, by way of a global sum together with exemplary damages. (paras 32, 36, 37, 38 & 42)

(5) The purpose of exemplary damages is to show the court's abhorrence to 'outrageous' conduct which conduct or behaviour is punishable. The plaintiff failed in bringing himself within the categories enunciated in *Rookes v. Barnard* and failed to show 'outrageous' conduct. A reasonable judge faced with similar facts would not have granted exemplary damages. The decision of the SCJ was plainly wrong and against the established principles for awarding exemplary damages. Appellate interference was justified in setting aside the global sum of RM50,000 that made up general damages, aggravated damages and exemplary damages. (paras 43, 47 & 48)

Case(s) referred to:

Bohjaraj Kasinathan v. Nagarajan Verappan & Anor [2001] 4 CLJ 433 HC ***(refd)***
Broome v. Cassell [1972] AC 1027 ***(refd)***
Doyle v. Olby (Ironmongers) Ltd [1969] 2 WLR 673 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Ishak Ahmad v. Unggul 88 Sdn Bhd & Ors [2020] 1 LNS 1368 HC ***(foll)***
Kee Wah Soong v. Yap Boon Hwa & Another Appeal [2018] 1 LNS 1284 CA ***(refd)***
Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor [2021] 6 CLJ 157 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Octville Golf Properties Sdn Bhd v. Uniwheels Sdn Bhd [2012] 1 LNS 694 HC ***(refd)***
Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors [2021] 4 CLJ 821 FC ***(refd)***
Preferred Synergy Sdn Bhd v. Beta Tegap Sdn Bhd [2017] 1 LNS 2215 HC
Rasidin Partorjo v. Frederick Kiai [1976] 1 LNS 123 FC ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors [1997] 1 CLJ Supp 39; [1997] 1 BLJ 39 HC ***(refd)***
S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors [2019] 1 LNS 93 CA ***(refd)***
Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] 1 LNS 500 CA ***(refd)***
Shri @ Indran Ram Ramasamy v. Wong Yew Kee [2021] 1 LNS 293 HC ***(refd)***
Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***
Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd [1996] 4 All ER 769 ***(refd)***

Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***
Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals [2021] 9 CLJ 179 FC ***(refd)***
Thompson v. Commissioner of Police of the Metropolis [1997] 2 All ER 762 ***(refd)***
United Plywood & Sawmill Ltd v. Lock Ngan Loi [1970] 1 LNS 164 FC ***(refd)***
Wah Chan Consolidated Sdn Bhd v. Sasidaran Damoo Kunjiraman [2004] 1 LNS 324 HC ***(refd)***

For the appellants - Ee Yen Chin; M/s Ee Yen Chin & Co
For the respondent - Stephen Lee Ming; M/s Lee Khim Huei & Partners

[Editor's note: Appeal from Sessions Court; Suit No: WA-A52NCvC-559-08-2020.]

Reported by Suhainah Wahiduddin

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] The parties are referred to as they were in the court below. The matter came before me as an appeal, after a full trial, by Big Junkyard Sdn Bhd and Chong Kok Sing ("the first defendant" and "second defendant" respectively) against the decision of the learned Sessions Court Judge who had allowed Chan Kah Wai's ("the plaintiff') claim and granted the following reliefs:

(i) a declaration that the sub tenancy agreement dated 24 September 2019 executed by the plaintiff and the first defendant is invalid and rescinded *ab initio*;

(ii) an order for restitution by the defendants, jointly or severally, to the plaintiff for the sum of RM89,371.50;

(iii) the defendants jointly and severally pay the plaintiff RM50,000 globally as general damages, aggravated damages and exemplary damaged; and

(iv) the defendants jointly and severally pay the plaintiff RM10,000 as costs.

[2] On 19 August 2022, I allowed the defendants' appeal in part as follows: (i) reducing the order of restitution to RM69,371.50; (ii) setting aside the RM50,000 ordered to be paid to the plaintiff as global damages for general damages, aggravated damages and exemplary damaged; (iii) the costs to be paid to the plaintiff at the Sessions Court is reduced to RM5,000. Costs of RM8,000 for the present appeal to be paid by the plaintiff to the defendants subject to allocator fees.

[3] The reasons for my decision are stated below.

Background

[4] At the court below, the plaintiff (PW1) gave evidence on his own behalf while the second defendant (DW2) gave evidence on his own behalf and also as witness for the first defendant. The only other witness was Leong Yee Chuan (DW1), a freelance interpreter who was called as witness for the defendants.

Plaintiff's Pleaded Case

[5] The plaintiff was a sole proprietorship trading as YTwo Coffee House while the first defendant was in the restaurant and bar business located at No. 20 (Ground Floor), Jalan Radin Bagus 1, Bandar Baru Sri Petaling, Kuala Lumpur ("the R & B business"). The second defendant was the managing director of the first defendant and majority shareholder. It was claimed that, in a meeting arranged by a realty agent, an offer was made to purchase the R & B business including its furniture, fixtures, fittings and equipment at a sum of RM31,500 and to rent the said premises at RM10,000. It was alleged that the second defendant had represented then that the first defendant was the landlord of the premises.

[6] The plaintiff accepted the offer and on 1 September 2019 paid RM10,000 to the said agent as rental deposit pending the tenancy agreement being executed. On 24 September 2019, the plaintiff realised that the first defendant was not the landlord as the tenancy agreement prepared by the agent was actually a sub tenancy agreement. It was claimed that as a result of the second defendant's representation that the consent of the landlord had been obtained to sublet the premises the plaintiff said that he was induced to execute the sub tenancy agreement.

[7] The plaintiff claimed that sometime in October 2019, he paid a sum of RM61,500 into the account of the first defendant at CIMB Bank. The money was payment for the furniture, fittings and equipment (RM31,500), two months' advance rental (RM20,000) and security and utilities deposits (RM10,000). Apart from the above, the plaintiff claimed to have spent RM55,598.50 to improve and renovate the said premises, purchase furniture and equipment for the R & B business.

[8] However, sometime in November 2019, the plaintiff alleged that he was informed by one Terence Ng, the representative of the landlord of the said premises, Idea Stream Media Sdn Bhd ("the landlord") that the first defendant did not obtain any consent to sublet the said premises to the respondent. The plaintiff was given a copy of the tenancy agreement dated 1 October 2018 between the landlord and the first defendant which was produced by the plaintiff in evidence ("tenancy agreement"). The plaintiff claimed that the landlord had demanded that the plaintiff to vacate and hand over possession of the said premises to the landlord immediately or face legal action.

[9] The plaintiff complied with the demand of the landlord. Thereafter, the plaintiff commenced an action in the Sessions Court for restitution for the sum of RM127,098.50 that had been expended (as shown above) and, general damages, aggravated damages and exemplary damages for fraudulent misrepresentation. The claim against the first defendant was that the sub tenancy agreement was void for total failure of consideration and that the plaintiff had the right to rescind the same *ab initio*. The plaintiff also sought to lift the corporate veil by making the second defendant jointly and severally liable being the first defendant's directing mind and will and making the fraudulent misrepresentation and causing loss to him.

The Defendants' Defence

[10] The execution of the sub tenancy agreement and the fact that the first defendant was merely a tenant of the premises was admitted. The first defendant pleaded that the plaintiff had entered into the agreement knowing it was a sub tenancy and denied making the alleged misrepresentation. It was admitted that on 1 September 2019 a sum of RM10,000 was paid by the plaintiff and subsequently the sum of RM61,500. It was also pleaded that the plaintiff refused to pay the rent for December 2019 which became due on 24 November 2019 despite repeated demands for the same by the first defendant.

[11] It was further alleged that on 26 December 2019, the plaintiff informed the second defendant by WhatsApp that he was unable to continue with the tenancy and as a result thereof the sub-tenancy agreement was terminated and the two months rental deposit was to be forfeited for breach of the agreement. The defendants alleged that the story of the landlord requiring the plaintiff to leave the premises was a concoction by the plaintiff. The first defendant counterclaimed RM10,000 from the plaintiff made up as follows: RM20,000 for rental owed for December 2019 and January 2020 set-off with the utilities deposit of RM10,000. However, the first defendant withdrew the counterclaim before the trial began. It was also not in dispute that the first defendant could only sub-let the premises with the written consent of the landlord and that no such written consent was obtained. The second defendant, on the other hand, pleaded that there could be no claim against him given that the sub tenancy agreement was solely between the first defendant and the plaintiff.

Decision Of The Sessions Court

[12] The learned Sessions Court Judge found on a balance of probabilities that the plaintiff had proven his case. It was held that the first defendant had not obtained the consent of the landlord for the sub tenancy agreement to be made pursuant to s. 4.07 of the said tenancy agreement. Thus, it was held that the sub tenancy agreement entered between the plaintiff and first

defendant was invalid and void *ab initio* on the misrepresentation of the second defendant. The case of *Ishak Ahmad v. Unggul 88 Sdn Bhd & Ors* [2020] 1 LNS 1368 was relied by the learned Sessions Court Judge.

[13] The principle of "*nemo dat quod non habef*" meaning that no one can give what they do not have referred to in *Preferred Synergy Sdn Bhd v. Beta Tegap Sdn Bhd* [2017] 1 LNS 2215 was also held applicable by the learned Sessions Court Judge on the facts of the case.

[14] The learned Sessions Court Judge found that the second defendant had fraudulently misrepresented to the plaintiff that the consent from the landlord was obtained under the tenancy agreement and had thereby induced the plaintiff to enter into the sub tenancy agreement. On the facts of the case and supported by the decisions in *Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors* [2021] 4 CLJ 821; [2021] 3 MLJ 622 and *Shri @ Indran Ram Ramasamy v. Wong Yew Kee* [2021] 1 LNS 293; [2021] 10 MLJ 376 the veil of incorporation was lifted and the second defendant held severally and/or jointly liable with the first defendant. The undisputed evidence showed that the second defendant was the signatory for the first defendant in both the tenancy agreement and the sub tenancy agreement. Not the least crucial is the finding of fact that the plaintiff was required by the landlord to vacate the premises by providing the plaintiff with the copy of the said tenancy agreement.

The Law On Appellate Intervention

[15] In considering this appeal, I kept in mind the following established principles: an appellate court should be slow to interfere with the findings of fact of a trial court unless the findings were plainly wrong or arrived at with no or insufficient judicial appreciation of the evidence; or the findings were the result of misdirection by the trial court on the applicable law or there was a wrong application of the law to the facts; or the findings were of a kind which a reasonable court similarly circumstanced, which had properly directed itself and asked the right questions, would not have arrived at (see: *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[16] It has been pronounced that when considering the contention that there was no judicial appreciation of the evidence the standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. The standard does not concern the degree of confidence felt by the appellate court that it would have reached the same conclusion as the trial judge or the degree of certainty that the appellate court considered that it would have reached a different conclusion. The only question is whether the decision under appeal is one that no reasonable judge

could have reached. Thus, the plainly wrong test ought not to be used by the appellate court as a means to substitute the impugned decision with its own. (see: *Ng Hoo Kui (supra)* and *S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors* [2019] 1 LNS 93; [2019] 6 MLRA 350).

Deliberations And Decision

Whether The Sub Tenancy Agreement Is Invalid?

[17] The learned Sessions Court Judge found that no consent was obtained from the landlord allowing the first defendant to enter into a sub-tenancy as provided in s. 4.7 of the tenancy agreement which state as follows:

> The Tenant shall not assign, transfer, sub-let or part with the possession of the said Premises or any part thereof without the written consent of the Landlord (which consent shall not be unreasonably withheld to the Tenant's subsidiary or associated company as defined in the Companies Act, 1965) and the Landlord reserves the right to impose such terms and conditions for such consent.

[18] The failure to obtain consent under s. 4.7 of tenancy agreement is not in dispute and the learned Sessions Court Judge held that the lack of such consent rendered the sub tenancy agreement invalid. The defendants contended that the learned Sessions Court Judge erred in law on the ground that the lack of written consent does not invalidate the sub tenancy agreement. The error of law it is argued occurred when the learned Sessions Court Judge failed to consider and adopt the principle stated by the High Court in *Wah Chan Consolidated Sdn Bhd v. Sasidaran Damoo Kunjiraman* [2004] 1 LNS 324; [2005] 1 MLJ 747, a case said to be on all fours with the case at hand.

[19] In my view, *Wah Chan Consolidated* is distinguishable on the facts. There, the party knew that what was being entered into was a sub-tenancy agreement and most importantly the party was not induced to enter into the agreement by misrepresentation of facts that were false. Further, in *Wah Chan Consolidated* the subtenant sought to resile from the sub tenancy agreement after a period of about three years of performing the said subtenancy agreement. In the case at hand, the learned Sessions Court Judge found that the plaintiff was induced to enter into the sub tenancy agreement by fraudulent misrepresentation and relied on the decision in *Ishak Ahmad* which held as follows:

> The First Defendant, not being the owner of the land itself, and having failed to obtain the necessary approval from the Pesuruhjaya Tanah Persekutuan, therefore, had no right to sub-let it to the Plaintiff.

[20] In the case at hand, the fact that the first defendant did not have the consent to sub-let the premises and had through the misrepresentation by the second defendant induced the plaintiff to enter into the sub tenancy agreement was a critical fact. The first defendant had no right to sub-let the

premises to the plaintiff and therefore the learned Sessions Court Judge was correct to rely on the principle in *Ishak Ahmad*. In the circumstances there was no error of law committed by the learned Sessions Court Judge.

[21] The case of *Octville Golf Properties Sdn Bhd v. Uniwheels Sdn Bhd* [2012] 1 LNS 694; [2013] 8 MLJ 558 also supported the finding reached by the learned Sessions Court Judge. It was held in the said case as follows:

> [44] As the requirement for KFH's prior written consent is an express stipulation under the debenture, it is incumbent upon the parties to produce the necessary written consent in support of their assertion. The charged assets under the debenture which includes the land and the warehouses have been secured in favour of KFH as security for the loan facilities granted to the defendant. Unless and until the prior written consent of *KFH* is obtained*, the defendant has neither the legal capacity or power to enter into any tenancy agreement for land. Since there was no prior written consent for the tenancy agreement, it must follow that the tenancy agreement is invalid and unenforceable.* (emphasis added)

The Cause Of The Termination Of The Sub Tenancy Agreement

[22] The learned Sessions Court Judge made a finding of fact that the termination of the sub tenancy agreement was the result of the landlord threatening legal action against the plaintiff on the ground that the landlord had not given its consent to sub-let the premises. The defendants' contended that it was the plaintiff who initiated the termination based on certain WhatsApp messages and that the threat by the landlord was merely a story created to get out of the sub tenancy agreement. The WhatsApp messages were to the effect that the plaintiff could not carry on with the business because his partner had run away with the money for the business.

[23] I considered the testimony of the parties and the WhatsApp messages and reached the conclusion that there was credible and sufficient evidence for the learned Sessions Court Judge to arrive at the finding he did. Firstly, the plaintiff had plausibly explained the WhatsApp message in cross-examination as shown below:

> Question: Can you tell the Court, what do you mean by one of your shareholders here, 'telah menyelewengkan duit dan melarikan diri.' What do you mean by that?
>
> Answer: Ok. So, for this YTwo Coffee House, there is only one director, so there must, there might be some misunderstanding here. So, what I mean here is the shareholder in my other business, the YTwo Tinted business, the partner took away the money and has run away, and because that time, I was so stressed out with this issue, and also at the same time, the landlord was kept coming, that's why I told Jimmy honestly that I couldn't continue the business any more.

[24] Secondly, the undisputed evidence showed that the plaintiff was the sole proprietor with business registration 003011312-U and not a partnership. Thus, his evidence that his partner absconded with the money in respect of another business, namely, YTwo Tinted was credible evidence which the learned Sessions Court Judge hearing the witnesses first hand was entitled to accept.

[25] Thirdly, the plaintiff had testified that he only entered into the sub tenancy agreement because of the fraudulent misrepresentation of the second defendant which induced him to enter into the sub tenancy agreement. The fraudulent misrepresentation was established based on the following evidence beginning with the witness statement of the plaintiff where the following appears:

Soalan: What happened then?

Jawapan: I have agreed to accept the second Defendant's offer by paying the initial deposit sum of RM10,000 to the Defendants' agent, CID Realtors Sdn Bhd. However, upon signing the sub tenancy agreement only I was told that the Defendants were only a Tenant of the said Premises. Nonetheless, the second Defendant had represented and assured me that the consent/ approval of the Landlord of the said Premises had been obtained before the Defendants signed and entered into this sub tenancy agreement.

[26] This was followed with the following evidence elicited during cross-examination of the second defendant who admitted to telling the plaintiff that no consent was obtained from the landlord to sub-let the premises only after the sub tenancy agreement was executed. This is clear from the following answers elicited from the second defendant in cross-examination:

Soalan: Setuju dengan saya tak, Encik pernah memaklumkan kepada Plaintif bahawa kebenaran tuan tanah telah diperolehi untuk menyewa atau sub-let premis tersebut kepada Plaintif?

Jawapan: Ya, setuju

Soalan: Encik pernah memaklumkan isu kebenaran ini kepada Plaintif sebelum menandatangani perjanjian sub-penyewaan?

Jawapan: Selepas.

Soalan: So Encik, selepas Plaintif menandatangani perjanjian sub penyewaan ini baru Encik memaklumkan kepada Plaintif bahawa kebenaran bertulis tuan tanah tak ada. Betul?

Jawapan: Ya.

[27] Fourthly, the undisputed evidence showed that the plaintiff had merely occupied the said premises for less than sixty days which includes the time taken for renovations. The story of the landlord asking the plaintiff to

leave the premises was very probable. The allegation that the landlord had disturbed the peace of the plaintiff was supported by the following undisputed facts: (i) the plaintiff had entered into the sub tenancy agreement on 24 September 2019, renovated the said premises in October 2019 and only commenced the business in November 2019 which was confirmed in cross-examination; (ii) sometime in November 2019, the landlord had given a copy of the tenancy agreement to the plaintiff and asked the plaintiff to leave the premises; (iii) in less than one month after renovating the premises, the plaintiff was forced to hand over the premises back to the landlord; (iv) the evidence that the plaintiff was unable to continue with the business in such circumstances is very probable given the fact that the plaintiff had only just expended a large sum of money including paying RM30,000 as deposit for rental and utilities and RM31,500 for the furniture and fixtures not including renovation expenses.

[28] In the circumstances, there were no reason to disturb the finding of fact made by the learned Sessions Court Judge. In considering the evidence in the record of appeal in its totality, I am of the considered view that the learned Sessions Court Judge was not plainly wrong in making the findings and decision arrived at. The findings were such which a reasonable court similarly circumstanced, and which had properly directed itself and asked the right questions, would make.

The Finding Of Liability Of The Second Defendant

[29] The learned Sessions Court Judge had found that the misrepresentation was fraudulently made by the second respondent who was the managing director of the first defendant and that in the circumstances the plaintiff was entitled to rescission of the sub tenancy agreement and all damages directly flowing from the fraudulent inducement.

[30] The case of *Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors* [2021] 4 CLJ 821; [2021] 3 MLJ 622 support the plaintiff's position on the liability of the second defendant for his role in the fraudulent misrepresentation. There it was held as follows:

> [55] Therefore, it is readily apparent in the instant case that as the trial judge found fraud to have been perpetrated, that in itself warrants the allocation of liability to the perpetrators of the fraud, independently of the doctrine of piercing the corporate veil as espoused by Lord Sumption. The finding of fraud encompassed Tony Ong as well as the two companies which he controlled, Perfect Solution and PS Bina. ...
>
> [59] So the application of this broad principle founded on the finding of fraud, in itself warrants the corporate personalities of the companies being disregarded. In other words, liability was found against Tony Ong and each of the companies by reason of the fraud alone, without the invocation of the doctrine of the piercing of the corporate veil.
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> ...

> [66] Finally, it is worth noting that in summarising the test for the piercing of the corporate veil, Lord Sumption held at para. 35 of *Prest* that: ... The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

[31] In any event, the second defendant was the directing mind and will or the alter ego of the first defendant. The second defendant had made fraudulent representations to the plaintiff to induce the plaintiff to enter into the sub tenancy agreement which the plaintiff otherwise would not have done so. The second defendant was the signatory for the first defendant on both the tenancy agreement and the sub tenancy agreement and was well aware of all the facts especially that consent of the landlord must be obtained before the premises could be sub-let. I found that the learned Sessions Court Judge's finding of the second defendant's liability for the losses suffered by the plaintiff were correct and based on evidence. It was a decision that any reasonable judge would have reached faced with similar facts.

Measure Of Damages For Fraudulent Misrepresentation

[32] Thus, the defendants were liable to pay the plaintiff, jointly and severally, damages directly flowing from the fraudulent inducement. The law governing the measure of damages for fraudulent misrepresentation was enunciated by Lord Denning MR in *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 WLR 673 as follows:

> In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:
>
> > I would not have entered into this bargain at ail but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well as suffered this or that extra damages.
>
> All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case the plaintiff has not only lost the money which he paid for the business, which he would never have done if there had been no fraud; he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his

A loss, subject, of course, to giving credit for any benefit that he has received. There is nothing to be taken off in mitigation: for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably be expected to do.

[33] The law stated in *Doyle* was approved by the House of Lords in *Smith*
B *New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 where Lord Browne-Wilkinson stated (at p. 777) that the measure of damages where a contract has been induced by fraudulent misrepresentation is reparation for all the actual damage directly flowing from (*ie*, caused by) entering into the transaction and are not limited to those
C which were reasonably foreseeable. The damages recoverable also include consequential loss suffered by reason of having acquired the asset. These principles were followed by the Court of Appeal in *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227 and *Kee Wah Soong v. Yap Boon Hwa & Another Appeal* [2018] 1 LNS 1284.

D **[34]** The plaintiff had pleaded and claimed damages which were framed as follows:

(i) restitutionary damages amounting to RM127,098.50 for the deposits, furniture and fittings and renovation expenses;

E (ii) general damages;

(iii) aggravated damages; and

(iv) exemplary damages.

[35] As shown above, what the learned Sessions Court Judge did was to
F award RM89,371.50 as restitutionary damages and RM50,000 as global damages made up of general damages, aggravated damages and exemplary damages (see judgment at p. 36 rekod rayuan tambahan). Now, the law as to when an appellate court can interfere with an award of damages is trite. Interference is justified when the trial judge has acted on a wrong principle
G of law or has misapprehended the facts, or has made a wholly erroneous estimate of the damage either by taking into account irrelevant considerations or omitting to take into account relevant considerations or making an award that is so inordinately low or making an award that is so much out of line with the discernible trend of awards in reasonably comparable cases (see *Rasidin Partorjo v. Frederick Kiai* [1976] 1 LNS 123; [1976] 2 MLJ 214;
H *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 and *United Plywood & Sawmill Ltd v. Lock Ngan Loi* [1970] 1 LNS 164; [1970] 2 MLJ 237).

[36] I found that the learned Sessions Court Judge had applied the correct
I principles in awarding restitutionary damages except for failing to take into account RM20,000 that was received for furniture sold. It was for this reason

that appellate interference was warranted to reduce the amount to RM69,371.50. However, I found that the learned Sessions Court Judge had acted on a wrong principle of law or has misapprehended the facts when making a global award consisting of three heads of damages namely general damages, aggravated damages and exemplary damages.

[37] Firstly, the global award made goes against the principle of awarding damages in the form of reparations for actual damage directly flowing from the fraudulent misrepresentation. An award of general damages does not arise based on the facts of the case at hand and evidence led in court. The fact is that no evidence of general damages was produced before the trial judge.

[38] Secondly, aggravated damages and exemplary damages are not warranted on the facts of the case. As such, to award a global sum consisting of these two heads of damages is plainly wrong. Unfortunately, there is still confusion as to the circumstances when aggravated damages and exemplary damages are to be awarded. The starting point is that both these heads of damages are creatures of the common law and serve different purposes although they are in a manner linked with each other. The principles of aggravated and exemplary damages will be considered together below.

[39] Lord Diplock described aggravated damages in the landmark case of *Broome v. Cassell* [1972] AC 1027 at 1124 (accepted in *Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors* [1997] 1 CLJ Supp 39; [1997] 1 BLJ 39; [1996] 3 MLJ 337; *Bohjaraj Kasinathan v. Nagarajan Verappan & Anor* [2001] 4 CLJ 433; [2001] 6 MLJ 497; and recently by the Court of Appeal in the often-quoted case of *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors and Another Appeal* [2017] 1 LNS 500; [2018] 3 MLRA 488) as follows:

> Compensation for the injured feelings of the plaintiff where his sense of injury from the **wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it**.
>
> (emphasis added)

[40] The above principle was reiterated by the Court of Appeal in *Thompson v. Commissioner of Police of the Metropolis* [1997] 2 All ER 762 where it was explained that compensatory damages are made up of basic or general damages and aggravated damages, it was emphasised that aggravated damages are awarded where there are aggravating features that result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to basic damages. Their aggravating features were said to include conduct of the defendant who has acted in a high-handed, malicious or oppressive manner or the way the litigation is conducted. In similar vein the Court of Appeal in *Sambaga Valli* said:

> Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been **intangible injury to the interest of personality of the plaintiff and where this injury has been caused or exacerbated by the exceptional conduct of the defendant**. (emphasis added)

[41] Thus, aggravated damages are given as additional compensation where there is injury to the feelings of the plaintiff that is caused by or exacerbated as a result of exceptional conduct of the defendant. The conduct must be high-handed or malicious act or an act done in an oppressive manner. Mere wrongful conduct is not sufficient. There must be something exceptional in the act that was done. The matter was lucidly stated by Lord Devlin in *Rookes v. Barnard* [1964] AC 1129 at p. 1232 as follows:

> I doubt whether the facts disclosed in the summing up shows even a case for aggravated damages ... present there seems to be **no evidence that the Respondents were motivated by malevolence or spite** against the appellant ... Again in so far as disclosed in the summing up there was **no evidence of offensive conduct or of arrogance or insolence**.
>
> (emphasis added)

[42] The principles stated above show that there are two elements relevant to the availability of an award for aggravated damages: firstly, exceptional or contumelious conduct or motive on the part of the defendant in committing the wrong; secondly, intangible loss suffered as a result by the plaintiff, that is injury to feelings or personality. Based on the above principles, the facts of the case at hand does not make out a case for aggravated damages. There is nothing exceptional about the action of the second defendant. There is no evidence of offensive conduct or arrogance or insolence of motive or that the second defendant was motivated by malevolence or spite. The learned Sessions Court Judge had erred in law when awarding aggravated damages, *albeit*, by way of a global sum together with exemplary damages.

[43] The next issue is whether a case for exemplary damages has been made out. The purpose of exemplary damages is to show the court's abhorrence to "outrageous" conduct which conduct or behaviour is punishable. The purpose is to punish the defendant. There are two parts in granting exemplary damages. The first part is to clear the threshold. The plaintiff has to first show that he falls within one of the three categories enunciated in *Rookes v. Barnard* (recently reiterated by the Federal Court in *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] 3 MLJ 365 and *Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ 179).

[44] The failure to cross this threshold is fatal for a claim for exemplary damages. The three categories are:

(i) oppressive, arbitrary or unconstitutional action by the servant of the Government; or

(ii) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; or

(iii) where exemplary damages is expressly authorised by statute.

[45] Once the plaintiff has cleared this threshold, the plaintiff must show "outrageous" conduct. The principle is stated by Lord Devlin in *Rookes v. Barnard* as follows:

> In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to **punish him for his outrageous conduct** and to deter him from repeating it, then it can award some larger sum. (emphasis added)

[46] The Court of Appeal in *Sambaga Valli* gave a description of what may amount to "outrageous" punishable conduct:

> [33] The exemplary damages or punitive damages – the two terms now regarded as interchangeable – are additional damages **awarded with reference to the conduct of the defendant**, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. **Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff**. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff.
>
> (emphasis added)

[47] If this part is cleared, only then the court goes into the question of assessing the measure of exemplary damages to be awarded. This second part has its own principles which are not relevant here as the plaintiff has failed to cross the threshold. He failed in bringing himself within the categories and failed to show "outrageous" conduct. A reasonable judge faced with similar facts would not have granted exemplary damages. The decision of the learned Sessions Court Judge is plainly wrong and against the established principles for awarding exemplary damages.

[48] It was for the above reasons that appellate interference was justified in setting aside the global sum of RM50,000 that made up general damages, aggravated damages and exemplary damages.